Supreme Court, U.S.
FILED
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No. 01-647

IN THE

Supreme Court of the United States

CHRISTOPHER T. LIZZI,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, ROBERT ALEXANDER, CHARLES THOMAS, PHILLIP WALLACE, AL MCCOY, ANTHONY JOHNSON, AND DENISE KURTZ (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL KURTZ),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that the WMATA Compact did not waive WMATA's sovereign immunity from Family and Medical Leave Act ("FMLA") claims under the rationale of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49-50 (1994)?

2. Whether the Court of Appeals, consistent with every other Court of Appeals that has addressed this issue, correctly held that the FMLA did not abrogate WMATA's sovereign immunity?

3. Whether the Court of Appeals correctly found that the individual supervisors were entitled to the protection of WMATA's sovereign immunity because WMATA was the real party in interest?

LISTING OF AFFILIATES PURSUANT TO RULE 29

Pursuant to Rule 29, Respondent Washington Metropolitan Area Transit Authority ("WMATA") is an agency and instrumentality of Maryland, Virginia, and the District of Columbia, created by an interstate compact, as authorized by Congress. *See* Pub. L. No. 89-774. WMATA operates a regional transportation system in the Washington, D.C. metropolitan area. As a governmental entity, WMATA does not have any parent corporation, affiliates, or subsidiaries.

Respondents further note that Plaintiff's Petition incorrectly lists Jack Byrd as a Respondent. Plaintiff voluntarily dismissed Mr. Byrd as a Defendant while the case was pending in the District Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory sections are set forth in the Petition at 2-4. In addition, 29 U.S.C. § 2611 provides, in relevant part:

* * * *

(4) Employer

(A) In general

The term "employer" —

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes —

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

* * * *

STATEMENT OF THE CASE

A. Introduction.

Petitioner Christopher T. Lizzi was employed as a wheelchair lift mechanic by the Washington Metropolitan Area Transit Authority ("WMATA") until his termination on September 5, 1997. Petitioner alleges that his termination for unexcused absences violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* The named Defendants were WMATA and several supervisory-level WMATA employees. By Memorandum Opinion and Order dated May 12, 2000, the District Court granted WMATA's motion for summary judgment because of WMATA's sovereign immunity, but denied the motion as to the individual Defendants. Pet. App. 20a. By Order dated July 20, 2000, the District Court denied both sides' respective motions for reconsideration, but certified the case for an interlocutory appeal. Pet. App. 18a.

The U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's ruling as to WMATA, holding that the

WMATA Compact did not waive WMATA's Eleventh Amendment immunity from this type of suit and Congress did not validly abrogate the states' sovereign immunity from suit by private individuals when it enacted the FMLA. Pet. App. 3a. The Court of Appeals reversed the District Court's holding that the FMLA permits suit against the individual Defendants, finding that these claims were brought against them in their official capacity, and were in reality claims against WMATA itself. The record evidence supporting the Court of Appeals' decision is summarized below.

B. Petitioner's Misuse of Leave and Termination.

At least since 1994 until his termination on September 5, 1997, Petitioner succeeded in stringing together vacation and sick leave in order to be absent from work for continuous periods of time during each summer. In 1994, Plaintiff was absent from July 4 through September 9. Joint Appendix ("J.A.") 48[1]. In 1995, he was absent from June 16 through September 5. *Id.* In 1996, he was absent from June 24 through September 3. *Id.* In 1997, he was absent from June 27 up to the time of his termination on September 5. *Id.* Petitioner had a home near the beach at the New Jersey shore, where he spent a considerable amount of time each summer. J.A. 38.

Petitioner also established a pattern of asking to get off early on Fridays. J.A. 49. If his leave request was not granted, Petitioner would produce dental slips for appointments with his father, a semi-retired dentist, and take sick leave. *Id.* Plaintiff acknowledged in his deposition that the vast majority

1. Citations to the "Joint Appendix" refer to the Joint Appendix submitted to the Court of Appeals.

of his dental records at his father's dental office allegedly memorializing the treatment from his father were in his (Petitioner's) own handwriting. J.A. 42-45.

In the summer of 1997, WMATA commenced an investigation of Petitioner's leave situation. As a result of the investigation, Petitioner was referred to WMATA's medical office for an evaluation. J.A. 48. Petitioner informed the medical office that he would not attend at the scheduled time because he was using the prescription drug Percodan and was in New Jersey. J.A. 58. WMATA rescheduled the appointment. J.A. 48, 58. The examining physician informed Petitioner that she did not find any problem with his ankle or any reason why he could not return to work and referred him to an orthopedic surgeon for an independent medical examination ("IME"), which was scheduled for the next day. J.A. 48, 50, 51. Petitioner then advised the physician that he was on Percodan for gum-related problems; refused to take the card with the orthopedic surgeon's address and number on it; and failed to attend the scheduled IME. J.A. 48, 51.

A meeting was held on September 3, 1997 for Petitioner to present any mitigating circumstances regarding his possible dismissal. J.A. 54. Petitioner claimed at this meeting that he was unaware that the physician had attempted to set up the August 19, 1997 orthopedic IME. *Id.* On September 5, 1997, Petitioner was terminated. J.A. 11. That same day, he applied for FMLA leave. J.A. 17.

C. Proceedings Below.

Petitioner filed the instant action on August 7, 1998. J.A. 9. On May 12, 2000, U.S. District Judge Deborah K. Chasanow granted WMATA's motion for summary judgment

on immunity grounds and denied the individual Defendants' motion. Pet. App. 20a. On July 20, 2000, Judge Chasanow denied both Plaintiff's and the individual Defendants' motions for reconsideration, and certified the case for interlocutory appeal. Pet. App. 18a.

On June 20, 2001, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's finding that WMATA was protected by its sovereign immunity. The Court of Appeals held that the limited waiver of immunity in § 80 of the WMATA Compact for contracts and proprietary function torts in the WMATA Compact did not waive WMATA's immunity in other cases. The Court of Appeals also held that the FMLA did not abrogate WMATA's sovereign immunity. The Court of Appeals reversed the District Court's determination that the FMLA allowed suit against the individual supervisors. The Court of Appeals found that such "claims were in reality an action against the agency itself" and that "[t]he FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state." Pet. App. 17a.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Holding That The WMATA Compact Does Not Provide A Broad Waiver Of WMATA's Sovereign Immunity Is Fully Consistent With This Court's Decision In *Hess*.

On the first issue raised by Petitioner, the issue of the extent of the partial waiver of WMATA's sovereign immunity through the WMATA Compact, Petitioner fails to establish any conflict in the Circuits or other reason which requires

resolution by the Court. Rather, the gravamen of Petitioner's argument is that both Circuits which handle WMATA cases (*i.e.*, the Fourth Circuit below and the District of Columbia Circuit through *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986) and its progeny) are uniformly wrong.

This Court need look no further than its decision in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) as proof that both *Morris* and the decision below relying on *Morris* were correctly decided. In *Hess*, 513 U.S. at 49-50, this Court specifically distinguished the Port Authority situation from that of WMATA, stating:

> And in *Morris v. Washington Metropolitan Area Transit Authority*. 781 F.2d 218 (CADC 1986), Eleventh Amendment immunity was accorded an interstate transit system whose revenue shortfall Congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits. *See id.*, at 225-227. As the *Morris* court concluded: "[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." *Id.*, at 227. [Footnote 20]. There is no such requirement where the agency is structured, as the Port Authority is, to be self-sustaining.

Hess, 513 U.S. at 50 n.20 further notes:

> The decision in *Morris* is compatible with our approach. *See supra*, at 43-44. Thus, we establish

> no "*per se* rule that the Eleventh Amendment never applies when States act in concert." [Citation omitted].

Thus, this Court specifically approved the *Morris* finding that WMATA, a state-level interstate compact governmental entity, possesses Eleventh Amendment/sovereign immunity except as expressly waived. Significantly, *Hess* was decided after the *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) and *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) cases cited by Petitioner. Contrary to Petitioner's argument, *Hess* establishes that *Morris* and the decision below were correctly decided and properly interpret all relevant provisions of the WMATA Compact regarding WMATA's immunity.[2] The Fourth Circuit's decision below on the issue is not only faithful to the language of the WMATA Compact, but also is consistent with *Hess* and the numerous decisions of the District of Columbia Circuit, the only other Circuit likely to hear cases in which WMATA is a party, cited in the Fourth Circuit's decision at Pet. App. 10a.

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2. Justice O'Connor's dissent in *Hess*, 513 U.S. at 60-61, joined in by three other Justices, clearly agrees with the portion of the majority opinion citing *Morris* by stating that "I have no quarrel at all with the many cases cited by the Court for the proposition that *if* an entity's bills will be footed by the State, the Eleventh Amendment clearly precludes the exercise of federal jurisdiction." Thus, *Hess* was unanimous in its reasoning that an entity such as WMATA retains Eleventh Amendment/sovereign immunity.

II. The Fourth Circuit's Holding That The FMLA Does Not Abrogate Eleventh Amendment Immunity Is Fully Consistent With This Court's Recent Decisions On Eleventh Amendment Immunity.

Petitioner's argument on this issue not only fails to establish any conflict among the Circuits, but rather emphasizes that the decision below is fully consistent with all of the Circuits which have addressed the issue of whether the FMLA validly abrogates Eleventh Amendment/sovereign immunity. *See Laro v. New Hampshire*, 259 F.3d 1, 11-13 (1st Cir. 2001); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Chittister v. Department of Cmty. and Econ. Development*, 226 F.3d 223, 228-229 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 526-528 (5th Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559, 564-566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 68-69 (2d Cir. 2000). All of these decisions are fully consistent with the recent decisions of this Court emphasizing that states may not be sued without their consent in either federal or state court unless Congress unequivocally states an intention to abrogate immunity under an appropriate enforcement clause of the Constitution (*i.e.*, § 5 of the Fourteenth Amendment). *See Board of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For legislation to be properly enacted under § 5, the legislative record must reflect a significant pattern of unconstitutional state discrimination violative of the Fourteenth Amendment, and the remedy imposed must be congruent and proportional to the targeted violation. Consequently, as the decision below is fully consistent with the aforementioned decisions of this Court and all of the

Courts of Appeals which have addressed this issue in the context of the FMLA, there is nothing for this Court to resolve by granting review.

III. The Decision Below On The Nonliability Of The Individual Defendants Is Fully Consistent With Prior Decisions Of This Court, Particularly Where WMATA Is The Real Party In Interest.

With respect to the issue of individual Defendant's nonliability under the FMLA, Petitioner acknowledges that the decision below is consistent with the holdings of two other decisions which have addressed this issue. *Kazmier v. Widmann*, 225 F.3d 519, 533 n.65 (5th Cir. 2000); *Wascura v. Carver*, 169 F.3d 683, 688 (11th Cir. 1999). However, Plaintiff relies primarily upon the Tenth Circuit's decision in *Cornforth v. University of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001) in support of his argument. Contrary to the assertion at page 20 of the Petition that "[t]he Tenth Circuit squarely rejected the Fourth Circuit's reasoning," the decision in *Cornforth*, rendered approximately two months after the Fourth Circuit's decision in the instant case, did not even refer to *Lizzi*. The Tenth Circuit was either not aware of the decision below and its well-reasoned explanation of why a plaintiff should not be allowed to evade sovereign immunity by suing individual supervisors, rather than the employer, or did not consider the situations to be comparable, which is hardly the basis for a true conflict of Circuits. The instant case best effectuates the real party in interest analysis reflected in this Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984), which states:

> When the suit is brought only against state officials, a question arises as to whether that suit

> is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." . . . Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." . . . And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. (Citations and footnote omitted.)

Pennhurst, 465 U.S. at 101 n.11 further states that

> [t]he general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."

(Citing to *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). *See also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the governmental entity itself"); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"). Under the foregoing precedent, the immunity of WMATA shelters the individual Defendants as well where, as the Court of Appeals properly

recognized, WMATA is the real party in interest. Moreover, the decision below is consistent with precedent establishing that supervisors cannot be held liable under other federal statutes such as Title VII and the ADEA. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994).

Even if this Court deems the decision below to be inconsistent with *Cornforth*, additional reasons dictate that review by this Court is not appropriate at this time. Although decisions of the Fifth (*Kazmier*) and Eleventh (*Wascura*) Circuits support the Fourth Circuit's decision below, other Circuits have yet to decide this issue. Even more importantly, the whole issue may well be moot, as neither *Cornforth* nor the decision below, nor any other Circuit, has interpreted the statutory language of the FMLA as to whether a governmental official may even be sued under the language of the statute itself. In *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 776 (M.D.N.C. 2000), the court found that the placement of the words "includes any 'public agency' " in 29 U.S.C. § 2611(4)(A)(iii) "strongly suggests that Congress intended subsection 4(A)(ii) to create individual liability for persons acting on behalf of private employers described in subsection (4)(A)(i), but not for persons acting on behalf of public employers defined by subsections (4)(A)(iii) and (iv)." The rationale of *Keene*, if ultimately adopted by the appellate courts, would render unnecessary any need for this Court to rule on the immunity analysis. Clearly, this Court does not want to waste time deciding what may become a moot issue, nor does it want to address the statutory interpretation issue without the benefit of any analysis by the Circuit Courts of Appeals. Consequently, *Keene* presents an additional, compelling reason why review by the Court should not be granted in the instant case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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